DOCKET

No. 07-10689
Title: James Eric Moore, Petitioner
v.
United States
Docketed: May 2, 2008
Lower Ct: United States Court of Appeals for the Eighth Circuit
Case Nos.: (05-4146, 05-4156)
Decision Date: March 6, 2008
Rehearing Denied: April 8, 2008

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Apr 25 2008	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due June 2, 2008)
May 7 2008	Waiver of right of respondent United States to respond filed.
May 14 2008	DISTRIBUTED for Conference of May 29, 2008.
May 21 2008	Response Requested . (Due June 20, 2008)
Jun 11 2008	Order extending time to file response to petition to and including July 21, 2008.
Jul 21 2008	Order further extending time to file response to petition to and including August 20, 2008.
Aug 20 2008	Brief of respondent United States filed.
Sep 4 2008	DISTRIBUTED for Conference of September 29, 2008.
Oct 6 2008	DISTRIBUTED for Conference of October 10, 2008.
Oct 14 2008	The petition for certiorari and the motion for leave to proceed in forma pauperis are GRANTED. The judgment of the Court of Appeals is REVERSED, and the case is REMANDED for further proceedings consistent with this opinion. Opinion per curiam. (Detached Opinion)
Nov 17 2008	JUDGMENT ISSUED.

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~~Name~~~~~~~~~~~~~~~~~~~~~~	~~~~~~~~Address~~~~~~~~~~~~~~~~~~~~	~~Phone~~~~
Attorneys for Petitioner:		
James Eric Moore	08062-029 FCI Sandstone P. O. Box 1000 Sandstone, MN 55072	
Party name: James Eric Moore		
Attorneys for Respondent:		
Gregory G. Garre	Solicitor General United States Department of Justice 950 Pennsylvania Avenue, N.W. Washington, DC 20530-0001	(202) 514-2217
Party name: United States		

PETITION FOR WRIT OF CERTIORARI

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ORIGINAL (2)

No. 07 10689

Supreme Court, U.S.
FILED
APR 25 2008
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IN THE

SUPREME COURT OF THE UNITED STATES

NO.05-4146-NO.05-4156

JAMES E. MOORE —PETITIONER

(Your Name)

VS.

UNITED STATES OF AMERICA —RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

(NAME OF COURT THAT LAST RULE ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

James E. Moore

(Your Name)

F.C.I. Sandstone, P.O. BOX 1000

(Address)

Sandstone, MN 55072

(City, State, Zip Code)

NONE

(Phone Number)

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QUESTION(S) PRESENTED

1. On remand from the Supreme Court in light of the Kimbrough decision stating that district courts must treat the sentencing guidelines 100 to 1 crack ratio as advisory. Did the Eighth Circuit Court of Appeals violate the Kimbrough decision by upholding the District Court's decision in which the District Court treated the 100 to 1 sentencing guideline ratio as mandatory.

2. Does the Supreme Court Kimbrough decision require District Courts to take into account the 100 to 1 crack ratio in a particular case and how well the ratio would effectuate the 18.3553(a) sentencing goals in the particular case.

LIST OF PARTIES

[x] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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OTHER

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[x] For cases from **federal courts:**

The opinion of the United States court of appeals at Appendix A to the petition and is

[x] report at U.S. v. Moore, 470 F.3d 767 (8th 2006); or,

[ ] has been designated for publication but is not yet reported; or,

[ ] is unpublished.

The opinion of the United States court of appeals at Appendix B to the petition and is

[x] report at U.S. v. Moore, 518 F.3d 577 (8th 2008); or,

[ ] has been designated for publication but is not yet reported; or,

[ ] is unpublished.

[ ] For cases from **state courts:**

The opinion of the highest state court to review the merits appears at Appendix ___ to the petition and is

[ ] report at _____; or,

[ ] has been designated for publication but is not yet reported; or,

[ ] is unpublished.

The opinion of the _____court appears at Appendix ___ to the petition and is

[ ] report at _____; or,

[ ] has been designated for publication but is not yet reported; or,

[ ] is unpublished.

JURISDICTION

[x] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was March 6, 2008.

[ ] No petition for rehearing was timely filed in my case.

[x] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: April 8, 2008, and a copy of the order denying rehearing appears at Appendix D.

[ ] An extension of time to file the petition for writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___ A _____.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

[ ] For cases from **state courts:**

The date on which the highest state court decided my case was_____.
A copy of that decision appears at Appendix ___.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix ___.

[ ] An extension of time to file the petition for writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___ A _____.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment VI

In All Criminal Prosecutions, the accused shall enjoy the right to a trial.

18.3553(a)(2)(A)

18.3553(a)(6)

STATEMENT OF THE CASE

21 U.S.C. § 841 provides for different mandatory minimum sentences depending on whether the substance involved is powder cocaine or crack cocaine. 21 U.S.C. § 841. Under this statute, for example, 5 grams of crack cocaine carries the same mandatory minimum sentence as 500 grams of powder cocaine. Id. This 100:1 ratio results in punishments that are substantially longer for crack cocaine offenders than for powder cocaine offenders. The Federal Sentencing Guidelines (hereafter the "Guidelines") also sentence crack cocaine offenders to substantially more imprisonment than powder cocaine offenders. U.S.S.G. § 2D1.1.

Mr. Moore is an African American. On November 23, 2004, a search warrant was executed at Mr. Moore's apartment in Cedar Rapids, Iowa. Seized in the search was .86 grams of crack cocaine. Mr. Moore was charged with and found guilty of possession of crack cocaine with the intent to distribute.

Mr. Moore was sentenced pursuant to the Guidelines. Under the Guidelines, the district court found that Mr. Moore's base level was 28 and added two levels for obstruction of justice. With a total offense level of 30 and a criminal history category VI, the guideline sentencing range was 151 to 188 months.

Mr. Moore requested a sentence below the guideline range in light of the factors set forth in 18 U.S.C. § 3553(a) and especially based on the unreasonable disparity between the penalties for crack versus powder cocaine offenses. Mr. Moore's claim was based on the United States' Sentencing Commission's

(hereafter "the Commission") repeated rejection of the 100:1 ratio. The district court denied Mr. Moore's request. On November 17, 2005, the district court sentenced Mr. Moore to 188 months imprisonment.

Mr. Moore appealed to the Eighth Circuit Court of Appeals. The Eighth Circuit affirmed the district court. In so doing, the court of appeals relied on its decision in United States v. Spears that "'neither Booker nor § 3553(a) authorizes district courts to reject' the powder cocaine to crack cocaine quantity ratio mandated by Congress and reflected in the Guidelines." United States v. Spears, 469 F.3d 1166 (8th Cir. 2006)(en banc).

Mr. Moore then appealed to the Supreme Court of the United States which remanded Mr. Moore's case in light of its decision in Kimbrough v. United States, 128 S.Ct. 567; holding the sentencing guidelines' 100:1 crack ratio must be treated as advisory. The Eighth Circuit again denied Mr. Moore's appeal by presuming that the district court knew she had discression to depart based on the Supreme Court Booker v. United States, 125 S.Ct. 738 (2005) decision and the 18.3553(a) sentencing goals based on a prior three Judge appeal decision citing United States v. Riza, 267 F.3d 757, 759 (8th Cir. 2001).

REASONS FOR GRANTING THE PETITION

In United States v. Booker, 125 S.Ct. 738 (2005), this Court addressed the issue of the Sixth Amendment limitations on the application of the Guidelines. This Court held that, in order to comply with the Sixth Amendment, the Guidelines must be treated as advisory. The Eighth Circuit decision in Mr. Moore's case conflicts with the Supreme Court Booker decision along with its decision in Kimbrough. The Supreme Court in the Kimbrough decision stated that courts must take into account the sentencing practices of other courts to determine an appropriate sentence in accordance with 18.3553(a)(6) directive. The first appeal court decision in Mr. Moore's case specifically stated the "District Court was correct in concluding that neither Booker, nor 18.3553(a) authorized district courts to reject the crack 100 to 1 ratio in the guidelines." See Appendix A, First Decision.

On remand from the Supreme Court, the Eighth Circuit panel now says they "presume the district court was aware of her discression to reject the guidelines 100 to 1 ratio" in Mr. Moore's case. Both decisions are contradicting each other with respect to the district court's statement. See Appendix B, Second Appeal Decision. The second appeal court decision does not accurately state the words of the district court stated at sentencing and have been patched together by using two different statements made by the district court at different times. The district court actually stated:

"with regard to the crack and powder cocaine difference,

> that is the law, I'm applying the law as it currently statnds. If that is going to be changed, that is a Congressional matter. Congress is the one who looks at the guidelines and decides whether or not they should be put in -- force. It isn't the government. It isn't the Judges. It's the lawmakers, and I have taken an oath to apply the law, and that's what I will do in this sentencing."

See Appendix C, Sentencing Transcript.

The Eighth Circuit Appeal Court quote of the district court's statement has been doctored to make it look as <u>if the</u> judge used her discression. See Appendix B, Second Appeal Decision. The Eighth Circuit Appeal panel stated that the district court did not state specifically that she did not have discression, but the district court did state just that by stating "Congress is the one who looks at the guideline and decides whether or not they should be put in force -- it isn't the government. It isn't the judges. It's the lawmakers, and I have taken an oath to apply the law, and that's what I will do in this sentencing." This short paragraph which goes against the appeal court claim was taken out of the district court's statement, or not mentioned for some strange reason. This statement makes it clear the district court thought judges had no discression to reject the guideline 100 to 1 ratio and that is why the first appeal court decision in Mr. Moore's case stated "the District Court was correct in concluding that neither Booker nor 18.3553(a) authorizes District Courts to reject the 100 to 1 ratio in the guidelines."

Now the appeal court panel wants to change its decision to say that the District Court is to be presumed to know she had discression. The Appeal Court's statement that the District Court stated "without more the court declines to depart based

on the crack disparity." But this would be illogical because the quote without more, would show the district court specifically took into account the crack disparity and declined to depart. But then Mr. Moore would not be arguing on appeal that the district court refused to take into account the crack disparity. The district court made no such statement "without more" during Mr. Moore's sentencing proceeding. Also the Eighth Circuit's reliance on the facts used by the district court to give Mr. Moore the high end of the guideline range is misplaced. Facts that are used to justify a sentence at the high end of a guideline range does not mean such facts would justify a certain base offense level when the base offense level was set on different guideline facts. The Eighth Circuit decision also conflicts with another appeal court decision, U.S. v. Pickett, 475 F.3d 1347 (D.C. 2007) that was cited in the Kimbrough decision, which stated that a district court commits a legal error when a district court refuses to take into account the guideline 100 to 1 crack ratio disparity and weigh it against the 18.3553(a) sentencing goals to determine an appropriate sentence in a particular case. The D.C. Court of Appeal stated that district courts must weigh the 100 to 1 crack ratio against the 18.3553(a) sentencing factors to determine how well the ratio would effectuate the 18.3553(a) sentencing goals in a particular case. The D.C. Court of Appeals' requirement of sentencing courts are identical to the Supreme Court's sentencing directives given in Kimbrough.

Therefore, the Supreme Court should overturn the Eighth Circuit opinion in Mr. Moore's case because the Eighth Circuit

opinion is in direct conflict with the Kimbrough sentencing directives. Also because the district courts statement that the crack cocaine ratio under the guidelines was a Congressional matter because Congress is the one who puts the guidelines in force, clearly shows the District Court was treating the 100 to 1 guideline crack ratio as binding on her, and that she gave no consideration of how well the ratio in Mr. Moore's case would effectuate the 18.3553(a) sentencing goals. Therefore, Mr. Moore prays the Supreme Court will again grant his petition.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

James Eric Moore

Dated this 25 day of April 2008.

Appendix A

offense. However, the relevant guidelines expressly permit the aggregation of drug quantities not specified in the offense of conviction if those transactions were "part of the same course of conduct or common scheme or plan as the offense of conviction." U.S.S.G. § 1B1.3(a)(2); see § 2D1.2, comment. (n.12); *United States v. Chatmon*, 962 F.2d 292, 294 (8th Cir.1992). The warrant search of Moore's residence uncovered 2.7 grams of crack cocaine. At trial, a police detective testified that Moore admitted buying for resale 2.5 grams of crack cocaine from four different individuals five or six times each, in the two previous months. The district court did not clearly err in finding that Moore's multiple purchases and resales were part of a common scheme or plan and aggregating these quantities to find Moore responsible for 83.56 grams of crack cocaine. See *United States v. Lincoln*, 413 F.3d 716, 717 (8th Cir.2005).

[3] Finally, Moore argues that the district court erred in failing to reduce his drug quantity determination by the amount of crack cocaine he purchased for personal use. *See United States v. Frazier*, 248 F.3d 473, 475-76 (8th Cir.2001) ("In calculating the base offense level ... for a conviction of possession with the intent to distribute ... drug quantities intended for personal use must be excluded"). At sentencing, Moore testified that he resold "about half" of the crack cocaine he purchased and personally used the rest. The district court did not credit this personal use testimony. Though Moore has a history of cocaine addiction, police found no evidence of personal drug use when they searched his residence, and the drug tests submitted as part of his supervised release indicated no drug use during the eight months prior to the warrant search. In addition, the court noted that the total of 83.56 grams of crack cocaine was at the high end of the offense level 28 range and therefore any incidental personal use quantities would not change the base offense level determination. *See* U.S.S.G. § 2D 1.1(c)(6) (Drug Quantity Table). These findings are not clearly erroneous.

[4] 3. Moore also argues that his 188-month sentence is unreasonable. The district court correctly determined that his advisory guidelines range is 151 to 188 months. The court then found that this "is in the heartland of cases," rejecting Moore's request for a downward departure or variance because "[t]his is not an atypical case or an atypical defendant." Expressly reviewing each of the sentencing factors in 18 U.S.C. § 3553(a), and noting that Moore committed this offense while on supervised release and has "a long criminal history dating back to age twelve," the court imposed a sentence at the top of the guidelines range. On appeal, Moore argues that the sentence is unreasonable, particularly because the district court refused to take into account the great disparity between the statutory and guidelines penalties for distributing crack versus powder cocaine. Our court has now confirmed that the district court was correct in concluding that "neither *Booker* nor § 3553(a) authorizes district courts to reject" the powder cocaine to crack cocaine quantity ratio mandated by Congress and reflected in the Guidelines. *United States v. Spears*, 469 F.3d 1136, 1176 (8th Cir. 2006) (en banc).

Our review of a district court's sentence for reasonableness under *Booker* is akin to review for abuse of discretion. *United States v. Lazenby*, 439 F.3d 930, 931-32 (8th Cir.2006). Having carefully considered the sentencing record, the reasons stated by the district court for the sentence imposed, and Moore's arguments on appeal, we conclude that the 188 month sentence, the top of Moore's advisory guidelines range, is not unreasonable.

The separate judgments of the district court dated November 17, 2005, are affirmed.

Abdi Gelle MOHAMED, Petitioner,

v.

Alberto R. GONZALES, United States Attorney General, Respondent.

No. 06-2357.

United States Court of Appeals, Eighth Circuit.

Submitted: Sept. 28, 2006.

Filed: Nov. 27, 2006.

Background: Alien, a Somali native, petitioned for writ of habeas corpus seeking relief from removal order of Board of Immigration Appeals (BIA). After initially granting relief, 371 F.Supp.2d 1048, the United States District Court for the District of Minnesota amended its judgment after passage of Real ID Act and transferred case to Court of Appeals as petition for judicial review.

Holdings: The Court of Appeals, Benton, Circuit Judge, held that:

(1) REAL ID Act did not violate Suspension Clause by denying writ of habeas corpus to alien;

(2) not holding competency hearing for alien was not an abuse of discretion or violation of procedural due process;

(3) alien was not prejudiced by two-year-and-two-month lapse;

(4) general ostracism and abuse at hands of other Somalis based on alien's mental illness was not torture under Convention Against Torture;

(5) IJ could reject alien's claim of torture because he was "Midgan" based on discrepancies among various stories told by alien himself.

Affirmed.

1. Habeas Corpus ⇐912

Collateral remedy which is neither inadequate nor ineffective to test the legality of a person's detention may be substituted for writ of habeas corpus without violating Suspension Clause, which provides that writ generally shall not be suspended. U.S.C.A. Const. Art. 1, § 9, cl. 2.

2. Aliens, Immigration, and Citizenship ⇐891

On petition for judicial review under REAL ID Act, alien would not be permitted to supplement administrative record with commitment order that was not presented to immigration judge (IJ) or Board of Immigration Appeals (BIA) in removal proceedings or by motion to reopen filed with BIA. Immigration and Nationality Act, § 242(b)(4)(A), 8 U.S.C.A. § 1252(b)(4)(A).

3. Aliens, Immigration, and Citizenship ⇐885

Habeas Corpus ⇐912

REAL ID Act, which denies writ of habeas corpus to alien resisting removal order and makes petition for review filed with court of appeals sole and exclusive means for judicial review, provided adequate and effective substitute for writ to test legality of detention as applied to alien, such that denial of writ did not violate Suspension Clause, notwithstanding that court of appeals could not consider mental health commitment order, which

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Appendix B

amendments to the Guidelines for crack cocaine offenses. In addition, for the first time in this appeal, King asserts he "might eventually benefit" from the district court's consideration of the crack/powder disparity in the Guidelines under 18 U.S.C. § 3553(a).

[6] Two changes have occurred during the pendency of King's appeal. First, effective November 1, 2007, the United States Sentencing Commission adopted Amendment 706, which modifies the Guidelines ranges for crack cocaine offenses. *See* United States Sentencing Guidelines Manual (2007), App. C, Amend. 706. Amendment 706 adjusts downward by two levels the base offense level assigned to each threshold quantity of crack cocaine listed in the Drug Quantity Table. *See* U.S.S.G. § 2D1.1; U.S.S.G. Supp. to App. C, Amend. 706. The Sentencing Commission has given retroactive effect to Amendment 706, beginning March 3, 2008. *See* 73 Fed.Reg. 217-01 (Jan. 2, 2008). Thus, as authorized by 18 U.S.C. § 3582(c)(2),[6] King's request for reduction of sentence in light of Amendment 706 must be decided by the district court in the first instance.

[7,8] The second change that occurred during the pendency of King's appeal was the Supreme Court's decision in *Kimbrough*. In *Kimbrough*, the Court held a sentence outside the Guidelines range is not per se unreasonable merely because the district court considered the sentencing disparity created by the 100:1 crack to powder cocaine quantity ratio set out in the Guidelines as a factor in determining the sentence. *Id.* However, as we have previously held, "[w]e do not believe, though, that *Kimbrough* means that a district court now acts unreasonably, abuses its discretion, or otherwise commits error if it does not consider the crack/powder sentencing disparity." *United States v. Roberson*, 517 F.3d 960, —, Nos. 06-3458, 06-3660, 2008 WL 322823, at *4 (8th Cir.2008); *see United States v. Johnson*, 517 F.3d 1020, —, No. 07-1980, 2008 WL 516518, at *3 (8th Cir.2008) ("Although *Kimbrough* empowers a district court to consider the disparity between guideline sentences for powder cocaine and crack, it does not require it to do so.").

[9] In this case, *Kimbrough* is not of any assistance to King. At no time prior to this appeal did King raise the issue of the disparity created by the 100:1 crack to powder cocaine quantity ratio. Nor did King ask the district court to consider the disparity in determining his sentence. Thus, King cannot argue on appeal the district court erred by failing to consider that factor. *See, e.g., United States v. Filipnick*, 466 F.3d 382, 384 (7th Cir.2006) (concluding "a defendant cannot complain on appeal that [his] sentence should have been reduced based upon § 3553(a) factors that were never brought to the attention of the district court"). Consequently, we conclude, in the posture of this case, remand to consider the applicability of *Kimbrough* is inappropriate.

III. CONCLUSION

For the foregoing reasons, we affirm the judgment of the district court. We note however, our resolution of this appeal is without prejudice to King's ability to move for modification of his sentence pursuant to 18 U.S.C. § 3582(c). *See, e.g., United States v. Williams*, No. 07-1918, 2008 WL 283813, at *2 (8th Cir. Feb.4, 2008) (per curiam) (unpublished); *United States v. Creyton*, No. 07-3862, 2008 WL 162823, at *2 (8th Cir. Jan.18, 2008) (unpublished order); *United States v. Brandy*, No. 06-2843, 2007 WL 4102765, at *1 (8th Cir. Nov.13, 2007) (unpublished order).

6. Section 3582(c)(2) in pertinent part provides:

> in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

Under § 3582(c)(2), such relief is authorized only for amendments reducing the applicable Guidelines ranges listed in § 1B1.10(c). *See* U.S.S.G. § 1B1.10(c) (effective March 3, 2008). However, "[t]he authorization of such a discretionary reduction does not otherwise affect the lawfulness of a previously imposed sentence, does not authorize a reduction in any other component of the sentence, and does not entitle a defendant to a reduced term of imprisonment as a matter of right." *Id.* cmt. background (2008).

UNITED STATES of America, Plaintiff-Appellee,

v.

James Eric MOORE, Defendant-Appellant.

Nos. 06-4156, 06-4156.

United States Court of Appeals, Eighth Circuit.

Submitted: Feb. 15, 2008.

Filed: March 6, 2008

Background: Defendant was convicted of possession of crack cocaine with intent to distribute, upon jury trial, in the United States District Court for the Northern District of Iowa, Linda R. Reade, Chief Judge, and sentence was imposed at top of advisory guidelines range, declining to grant downward departure or variance for 100:1 ratio sentencing disparity for crack versus powder cocaine. Defendant appealed. The Court of Appeals, 470 F.3d 767, affirmed. Defendant petitioned for writ of certiorari. The United States Supreme Court, 128 S.Ct. 858, granted certiorari, vacated judgment, and remanded.

Holdings: The Court of Appeals, Loken, Chief Judge, held that:

(1) sentence was not procedurally erroneous, and

(2) sentence was substantively reasonable.

Affirmed.

1. Sentencing and Punishment ⇐670

District court's imposition of sentence, for defendant's conviction of possession of crack cocaine with intent to distribute, at top of advisory sentencing guidelines range and declining to grant downward departure or variance for sentencing disparity for crack versus powder cocaine, known as 100:1 ratio, was not significant procedural error, under *Booker*, since court did not state that it had no discretion to take disparity into account in deciding whether variance was warranted by sentencing factors, but rather, court presumably elected not to exercise that discretion. 18 U.S.C.A. § 3553(a)(1, 2).

2. Sentencing and Punishment ⇐670

District court's imposition of sentence, for defendant's conviction of possession of crack cocaine with intent to distribute, at top of advisory sentencing guidelines range and declining to grant downward departure or variance for sentencing disparity for crack versus powder cocaine, known as 100:1 ratio, was substantively

reasonable, under *Gall*, since court carefully explained why sentencing factors warranted sentence. 18 U.S.C.A. § 3553(a)(1, 2).

David N. Nadler, Madison, WI, for Appellant.

Patrick J. Reinert, AUSA, Daniel G. Twelt, AUSA, Cedar Rapids, IA, for Appellee.

Before LOKEN, Chief Judge, SMITH and GRUENDER, Circuit Judges.

LOKEN, Chief Judge.

A jury convicted James Eric Moore of possession of crack cocaine with intent to distribute. The district court[1] declined to grant a downward departure or variance from the advisory guidelines sentencing range and sentenced Moore to 188 months in prison, the top of that range, followed by six years of supervised release. We affirmed the conviction and sentence, rejecting Moore's contention that his sentence is unreasonable because the district court "refused to take into account the great disparity" in the penalties imposed on crack and powder cocaine offenders under the now-advisory Guidelines. *United States v. Moore*, 470 F.3d 767, 770 (8th Cir. 2006). The Supreme Court granted Moore's petition for a writ of certiorari, vacated our judgment, and remanded for further consideration in light of its recent decision in *Kimbrough v. United States*, — U.S. —, 128 S.Ct. 558, 169 L.Ed.2d 481 (2007). *Moore v. United States*, — U.S. —, 128 S.Ct. 868, 169 L.Ed.2d 709 (2008). We conclude that the district court did not make the error of law identified in *Kimbrough* and did not abuse its substantial discretion in imposing a sentence within the guidelines range. *See Gall v. United States*, — U.S. —, 128 S.Ct. 586, 597, 169 L.Ed.2d 445 (2007). Accordingly, we again affirm.

Under § 2D1.1 of the Guidelines, a drug trafficker dealing in crack cocaine is subject to the same sentence as one dealing in one hundred times more powder cocaine. This sentencing relationship is commonly referred to, rather misleadingly, as a "100:1 ratio." The Sentencing Commission based these provisions on Congress's decision to adopt the same ratio in the mandatory minimum sentences for drug offenses found in 21 U.S.C. §§ 841(b)(1)(A)(iii) and (iii), (B)(iii) and (iii). *See Kimbrough*, 128 S.Ct. at 567. Though the resulting disparity has long been heavily criticized, Congress until recently rejected numerous Sentencing Commission proposals to reduce or eliminate it.[2] During the mandatory Guidelines era, we consistently held that the harsher penalties imposed on crack cocaine offenders were neither unconstitutional nor a proper basis for a downward departure under the Guidelines. *See United States v. Leeca*, 90 F.3d 302, 306 (8th Cir.1996).

When the Supreme Court declared the Guidelines advisory in *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), some district courts outside this circuit quickly held that the harsh crack cocaine penalties produced by the 100:1 ratio were a valid basis for a downward variance from the advisory guidelines range. *See, e.g., United States v. Perry*, 389 F.Supp.2d 278 (D.R.I.2005). At the time of Moore's sentencing in November 2005, our court had not considered this question. Citing decisions such as *Perry* and the Sentencing Commission's rejected proposals to amend the crack cocaine guidelines, Moore argued that "a sentence below the Guidelines range is warranted in view of the unreasonableness of the Guidelines' treatment of crack cocaine versus powder cocaine offenders." The district court responded:

> With regard to the crack and powder cocaine difference, that is the law. I'm applying the law as it currently stands. If that is going to be changed, that is a congressional matter. Congress is the one who looks at the guidelines and decides whether or not they should be put in-in force.... I'll be following what Congress has approved, which are the current guidelines that make that differentiation.

The district court then correctly calculated the guidelines range sentence, which included an enhancement for obstruction of justice because Moore lied repeatedly in testifying at trial and at the sentencing hearing. After considering each of the sentencing factors in 18 U.S.C. §§ 3553(a)(1) and (2), the court declined to depart downward or to grant a downward variance because "[t]his is not an atypical case or an atypical defendant." Noting that Moore committed this offense while on supervised release from a prior drug conviction, "has a long criminal history dating back to age twelve," and has the ability to work but has not worked steadily, the court imposed a 188-month sentence, the top of the advisory guidelines range.

One week after Moore was sentenced, we rejected the argument that *Booker* mandates a variance from the guidelines range because the crack-powder sentencing disparity is inherently unreasonable. *United States v. Cawthorn*, 429 F.3d 793, 802-03 (8th Cir.2005); *see United States v. Fisher*, 429 F.3d 895, 899-91 (8th Cir.2006). But three weeks later, another judge in the Northern District of Iowa held that the 100:1 ratio is inherently unreasonable and granted a downward variance based on an alternative range calculated by using a 20:1 ratio. The government appealed that sentence and, to avoid the prospect of inconsistent panel decisions on this recurring question, we granted initial en banc consideration and reversed, joining many other circuits in rejecting a downward variance based solely on the district court's categorical rejection of the 100:1 ratio. *United States v. Spears*, 469 F.3d 1166, 1178 (8th Cir.2006) (en banc). In affirming Moore's sentence, we relied on the en banc decision in *Spears*, which has also been vacated and remanded for further consideration in light of *Kimbrough*. *Spears v. United States*, — U.S. —, 128 S.Ct. 858, 169 L.Ed.2d 709 (2008).

In *Kimbrough*, the Supreme Court held that, "under *Booker*, the cocaine Guidelines, like all other Guidelines, are advisory only" and therefore the court of appeals erred "in holding the crack/powder disparity effectively mandatory." 128 S.Ct. at 564. The Supreme Court did not hold, as the district court held in *Spears*, that the crack cocaine guidelines are categorically unreasonable and should therefore be replaced with a judicial substitute such as the 20:1 ratio. Rather, the Court concluded that, in making the particularized sentencing determination required by 18 U.S.C. § 3553(a), the district court "may consider the disparity between the Guidelines' treatment of crack and powder cocaine offenses." *Id.* Indeed, in concluding that the sentence in *Kimbrough* "should survive appellate inspection" under *Booker*

1. The HONORABLE LINDA R. READE, Chief Judge of the United States District Court for the Northern District of Iowa.

2. Effective November 1, 2007, the Commission amended § 2D1.1 to reduce the sentencing disparity between crack and powder cocaine offenses and later made that amendment retroactive. *See* USSG App. C, Amend. 706, 711.

and Gall, the Court noted that the district court "did not purport to establish a ratio of its own," but instead "properly homed in on the particular circumstances of Kimbrough's case." *Id.* at 575–76.

[1, 2] In this case, the district court sentenced Moore prior to our en banc decision in *Spears*. The court rejected Moore's contention that the 100:1 ratio, without more, warranted a downward variance. But the court did not state it had no discretion under *Booker* to take the crack/powder guidelines disparity into account in deciding whether a variance was warranted by the discretionary § 3553(a) factors. As there was then no circuit authority to the contrary, we presume the district court was aware that *Booker* granted it discretion to vary downward based upon the impact of the crack cocaine guidelines on this defendant, but elected not to exercise that discretion. *Cf. United States v. Rios*, 367 F.3d 757, 759 (8th Cir.2004). Thus, like the district court in *Kimbrough*, the district court here committed no "significant procedural error" in applying *Booker*. *Gall*, 128 S.Ct. at 597. We must also review the substantive reasonableness of the 188-month sentence. In doing so, the Sentencing Commission's long-standing opposition to the 100:1 ratio provides some basis for not applying our normal presumption that a sentence within the advisory guidelines range is reasonable. *See Kimbrough*, 128 S.Ct. at 575. But whether or not the sentence in this case is presumptively reasonable, the district court's careful explication of why the § 3553(a) factors warranted a sentence at the top of Moore's advisory guidelines range requires us to conclude that the sentence is substantively reasonable under "the deferential abuse-of-discretion standard of review that applies to all sentencing decisions." *Gall*, 128 S.Ct. at 569.

For the foregoing reasons, and for the reasons stated in our prior opinion regarding all other issues raised in these consolidated appeals, the separate judgments of the district court dated November 21, 2006, are affirmed.

Robert STEINBUCH, Plaintiff-Appellant,

v.

Jessica CUTLER; Hyperion Books; Disney Publishing Worldwide; Home Box Office; Time Warner, Defendants-Appellees.

No. 07-1508.

United States Court of Appeals, Eighth Circuit.

Submitted: Jan. 14, 2008.

Filed: March 6, 2008.

Background: Law professor brought action against author, publisher, and distributor for invasion of privacy and intentional infliction of emotional distress arising from the publication of author's sexually explicit novel and the potential development of a future television series based on it. The United States District Court for the Eastern District of Arkansas, William R. Wilson, Jr., J., 2007 WL 486826, dismissed professor's action. Professor appealed.

Holdings: The Court of Appeals, Murphy, Circuit Judge, held that:

(1) professor was entitled to jurisdictional discovery to determine whether personal jurisdiction was justified;

(2) professor failed to show that parent company was subject to personal jurisdiction; and

(3) speculation regarding television production company and its parent company was insufficient to state privacy and outrage claim.

Affirmed in part and reversed in part.

1. Federal Courts ⇨96, 776

Court of Appeals reviews a dismissal for lack of personal jurisdiction de novo, and the party asserting jurisdiction bears the burden of establishing a prima facie case.

2. Federal Courts ⇨91

To survive a motion to dismiss for lack of personal jurisdiction, the plaintiff must state sufficient facts in the complaint to support a reasonable inference that defendants may be subjected to jurisdiction in the forum state.

3. Appeal and Error ⇨842(2)

Courts ⇨1012.1(1)

Arkansas long arm statute confers jurisdiction to the fullest constitutional extent, limiting appellate inquiry to whether such an exercise of jurisdiction would comport with due process. U.S.C.A. Const. Amend. 14; West's A.C.A. § 16-4-101(B).

4. Constitutional Law ⇨3964

Due process requires minimum contacts between a nonresident defendant and the forum state, such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. U.S.C.A. Const.Amend. 14.

5. Federal Courts ⇨76.5

Minimum contacts inquiry to exercise of personal jurisdiction focuses on whether the defendant purposely availed itself of the privilege of conducting activities within the forum state and thereby invoked the benefits and protections of its laws.

6. Federal Courts ⇨76.5

A state may exercise "general jurisdiction" if a defendant has carried on in the forum state a continuous and systematic, even if limited, part of its general business; in such circumstances the alleged injury need not have any connection with the forum state.

See publication Words and Phrases for other judicial constructions and definitions.

7. Federal Courts ⇨96

For an exercise of general jurisdiction, plaintiff must raise a prima facie showing that the defendant's contacts were not random, fortuitous, or attenuated.

8. Federal Courts ⇨76.10

"Specific jurisdiction" is appropriate only if the injury giving rise to the lawsuit occurred within or had some connection to the forum state, meaning that the defendant purposely directed its activities at the forum state and the claim arose out of or relates to those activities.

See publication Words and Phrases for other judicial constructions and definitions.

9. Federal Courts ⇨76.5

To evaluate the sufficiency of a defendant's contacts, for purposes of an exercise of personal jurisdiction, court considers five factors, affording the first three primary importance: (1) the nature and quantity of the defendant's contacts with the forum state; (2) the quantity of such contacts; (3) the relation of the cause of action to the contacts; (4) the interests of the forum state in providing a forum for its residents; and (5) the convenience of the parties.

Appendix C

lack of capacity or insanity or duress or mistake. He lied in order to reduce his ultimate sentence, and he lied to the jury in an attempt to characterize his drug use not as possession with intent to distribute, but as simple possession.

Defendant, by his own admission, has been through the federal system. He testified at trial, and he testified today, that he is no stranger to the concept of relevant conduct and how sentences are computed using drug quantity calculations. He knows about relevant conduct and drug quantities and how they affect a sentence by virtue of his prior drug conviction in federal court.

Defendant has carried his -- the United States has carried its burden of proving obstruction of justice by a preponderance of the evidence. I have evaluated the defendant's objections to the computation of the drug quantities. I find that the drug quantities used by Probation are consistent with the trial testimony that I believe. I do not believe the defendant's testimony either at trial or today.

start → With regard to the crack and powder

cocaine difference, that is the law. I'm applying the law as it currently stands. If that is going to be changed, that is a congressional matter. Congress is the one who looks at the guidelines and decides whether or not they should be put in -- in force. It isn't the Government. It isn't the judges. It's the lawmakers, and I have taken an oath to apply the law, and that's what I will do in this sentencing.

As far as aggregating, the law is settled on that, and that argument is without merit.

With regard to the personal use amounts being included, I -- I do not believe the defendant's testimony again that he was using six or seven times a month, beginning, now today he says, September, mid September, to the time of his arrest on this warrant; it was different, of course, at the time of trial.

However, the amount that the defendant is being held responsible for is 33.56 grams, and that's at the high end of a base offense level of 28. The range is 28 (sic) to 35 grams in order to be a base offense

Appendix D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 05-4146

United States of America,

Appellee

v.

James Eric Moore,

Appellant

No: 05-4156

United States of America,

Appellee

v.

James Eric Moore,

Appellant

Appeal from U.S. District Court for the Northern District of Iowa - Cedar Rapids
(1:00-cr-00028-LRR)
(CR04-0114-LRR)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

April 08, 2008

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

RESPONDENT'S BRIEF

120
30
RESPONSE REQUESTED

(3)

ORIGINAL

Supreme Court, U.S.
FILED
AUG 20 2008
OFFICE OF THE CLERK

No. 07-10689

IN THE SUPREME COURT OF THE UNITED STATES

JAMES ERIC MOORE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

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GREGORY G. GARRE
Acting Solicitor General
Counsel of Record

MATTHEW W. FRIEDRICH
Acting Assistant Attorney General

NINA GOODMAN
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether, in sentencing petitioner for crack-cocaine offenses, the district court erred because it believed it lacked the authority to reduce his sentence based on the disparity in the Sentencing Guidelines' treatment of offenses involving crack and powder cocaine.

IN THE SUPREME COURT OF THE UNITED STATES

No. 07-10689

JAMES ERIC MOORE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. B1-B5) is reported at 518 F.3d 577.

JURISDICTION

The judgment of the court of appeals was entered on March 6, 2008. A petition for rehearing was denied on April 8, 2008 (Pet. App. D2). The petition for a writ of certiorari was filed on April 25, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Iowa, petitioner was convicted on one count of possessing cocaine base with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C). He was sentenced to 188 months of imprisonment, to be followed by six years of supervised release. The court of appeals affirmed. 470 F.3d 767 (8th Cir. 2006). In light of Kimbrough v. United States, 128 S. Ct. 558 (2007), this Court vacated the court of appeals' judgment and remanded for further consideration. 128 S. Ct. 858 (2008). On remand, the court of appeals again affirmed. Pet. App. B1-B5.

1. On November 22, 2004, petitioner sold three rocks of crack cocaine to a government informant at his apartment in Cedar Rapids, Iowa. The following day, officers executed a search warrant at the apartment and found eight bags of crack in a pair of shorts in a dresser drawer. Petitioner admitted that he had obtained a total of approximately 30 grams of crack from various sources and that he was distributing crack from the apartment. Gov't C.A. Br. 4-9.

2. On December 16, 2004, a grand jury in the Northern District of Iowa returned an indictment charging petitioner with one count of possessing cocaine base with intent to distribute, in

violation of 21 U.S.C. 841(a)(1) and (b)(1)(C). Following a jury trial, petitioner was convicted on that single count.

Based on a total offense level of 30 and a criminal history category of V, the Probation Office determined that petitioner's advisory Guidelines sentencing range was 151 to 188 months of imprisonment. PSR ¶ 96. In calculating the base offense level, the Probation Office relied on Guidelines § 2D1.1; at the time petitioner was sentenced, that guideline established graduated sentencing ranges for drug-trafficking offenses that incorporated the 100:1 ratio of powder to crack cocaine that Congress used in setting the quantities required to trigger mandatory minimum sentences for those offenses. See Kimbrough, 128 S. Ct. at 566-567 (describing statutory and Guidelines regimes).

Petitioner was sentenced after this Court's decision in United States v. Booker, 543 U.S. 220 (2005). In Booker, the Court held that the Sixth Amendment applies to the federal Sentencing Guidelines, id. at 226-244, and that, as a remedial matter, two provisions of the Sentencing Reform Act of 1984, 18 U.S.C. 3551 et seq., should be severed, which would render the Guidelines advisory rather than mandatory, 543 U.S. at 244-268. At sentencing, petitioner contended, inter alia, that, in the wake of Booker, the district court should impose a below-Guidelines sentence "in view of the unreasonableness of the Guideline's treatment of crack cocaine versus powder cocaine offenders." Pet. Sentencing Br. 16.

At the sentencing hearing, the district court rejected that contention, stating as follows:

> With regard to the crack and cocaine difference, that is the law. I'm applying the law as it currently stands. If that is going to be changed, that is a congressional matter. Congress is the one who looks at the guidelines and decides whether or not they should be put * * * in force. It isn't the Government. It isn't the judges. It's the lawmakers, and I have taken an oath to apply the law, and that's what I will do in this sentencing.

11/17/05 Tr. 55-56. The court later added, "I talked about crack and powder cocaine and the fact that Congress * * * still differentiates between the two and that I'll be following what Congress has approved, which are the current guidelines that make that differentiation." Id. at 65. The district court ultimately declined to vary downward from the advisory Guidelines sentencing range, id. at 58, and sentenced petitioner to 188 months of imprisonment (the top of the Guidelines range), to be followed by six years of supervised release, id. at 71.*

3. Petitioner appealed, contending, inter alia, that his sentence was unreasonable because of the disparity in sentences under the Guidelines for crimes involving crack and powder cocaine; in response, the government contended that "the 100:1 ratio's alleged disparate impact is not a permissible ground for departure." Gov't C.A. Br. 34.

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* The district court also sentenced petitioner to a consecutive term of 24 months of imprisonment for violating conditions of supervised release imposed as a result of a prior drug-trafficking conviction. 11/17/05 Tr. 70-71.

The court of appeals affirmed. 470 F.3d 767 (8th Cir. 2006). The court of appeals noted that "the district court refused to take into account the great disparity between the statutory and guidelines penalties for distributing crack versus powder cocaine." Id. at 770. Citing its then-recent decision in United States v. Spears, 469 F.3d 1166 (8th Cir. 2006) (en banc), the court of appeals explained that "[o]ur court has now confirmed that the district court was correct in concluding that neither Booker nor [18 U.S.C.] § 3553(a) authorizes district courts to reject the powder cocaine to crack cocaine quantity ratio mandated by Congress and reflected in the Guidelines." 470 F.3d at 770 (internal quotation marks omitted).

4. After the court of appeals' initial decision in this case, the Court issued its decision in Kimbrough, in which it held that a sentencing court may consider the disparity in the Guidelines' treatment of crack and powder cocaine offenses in deciding whether a sentence within the Guidelines range is "greater than necessary" to achieve the purposes of sentencing under Section 3553(a). 128 S. Ct. at 575. In the wake of Kimbrough, the Court vacated the court of appeals' judgment and remanded for further consideration. 128 S. Ct. 858 (2008).

5. On remand, and without requesting supplemental briefing from the parties, the court of appeals again affirmed. Pet. App. B1-B5. According to the court of appeals, the district court "did

not state it had no discretion under Booker to take the crack/powder guidelines disparity into account in deciding whether a variance was warranted by the discretionary § 3553(a) factors." Id. at B4. Instead, because there was no circuit authority to the contrary at the time of sentencing, the court of appeals "presume[d] the district court was aware that Booker granted it discretion to vary downward based upon the impact of the crack cocaine guidelines on this defendant, but elected not to exercise that discretion." Ibid. The court therefore concluded that, "like the district court in Kimbrough, the district court here committed no 'significant procedural error' in applying Booker." Ibid. (quoting Gall v. United States, 128 S. Ct. 586, 597 (2007)).

DISCUSSION

Petitioner contends (Pet. 6-9) that the court of appeals erred by presuming that the district court was aware that it had the discretion to vary downward based on the disparity in the Guidelines' treatment of crack and powder cocaine offenses. The government agrees with petitioner that the district court appears to have believed that it lacked the discretion to vary downward, on the erroneous ground that the Guidelines' disparate treatment of crack and powder cocaine offenses was binding. While plenary review is not warranted, the government suggests that the Court grant the petition for a writ of certiorari for the limited purpose of vacat-

ing the court of appeals' judgment and remanding for further proceedings in light of the position expressed in this brief.

1. As noted above, in Kimbrough, this Court held that sentencing courts may consider the disparity in the Guidelines' treatment of crack and powder cocaine offenses in deciding whether a sentence within the Guidelines range is "greater than necessary" to achieve the purposes of sentencing under 18 U.S.C. 3553(a). 128 S. Ct. at 575. In the wake of Kimbrough, in reviewing decisions in which a district court imposed sentence before Kimbrough for a drug-trafficking offense involving crack cocaine, the courts of appeals (including the court of appeals below) have remanded for resentencing where it was apparent from the record that "the district court did not recognize its authority to vary from the advisory guidelines sentence" (and where it was not apparent whether the district court would have varied downward if it had been aware that it had the authority to do so). United States v. Cawthorn, 527 F.3d 678, 680 (8th Cir. 2008); see United States v. Thomas, 524 F.3d 855, 860 (8th Cir. 2008); United States v. Roberson, 517 F.3d 990, 995 (8th Cir. 2008); see also, e.g., United States v. Jones, 531 F.3d 163, 180-182 (2d Cir. 2008); United States v. Burns, 526 F.3d 852, 860-862 (5th Cir. 2008); United States v. Bush, 523 F.3d 727, 729-730 (7th Cir. 2008).

2. In its initial decision in this case, the court of appeals appears to have concluded that the district court believed

that it lacked the discretion to vary downward based on the disparity in the Guidelines' treatment of crack and powder cocaine offenses. See 470 F.3d at 770 (stating that "the district court was correct in concluding that neither Booker nor [18 U.S.C.] § 3553(a) authorizes district courts to reject the powder cocaine to crack cocaine quantity ratio mandated by Congress and reflected in the Guidelines") (internal quotation marks omitted). Presumably for that reason, this Court vacated the court of appeals' judgment and remanded for further consideration after Kimbrough was decided. See 128 S. Ct. at 858. On remand, however, the court of appeals, without requesting supplemental briefing from the parties, seemingly reversed course. After noting that the district court had sentenced petitioner before the Eighth Circuit's en banc decision in Spears, the court of appeals "presume[d]" that the district court was aware that it had the discretion to vary downward based on the crack-powder disparity (and that it simply elected not to exercise that discretion). See Pet. App. B4.

The district court's statements at petitioner's sentencing hearing, however, overcome any presumption that the district court was aware of its discretion under Booker to vary downward based on the crack-powder disparity. The district judge stated that "the crack and cocaine difference" was "the law as it currently stands"; that it was up to Congress, not judges, to "change[]" the law; and that the judge had "taken an oath to apply the law" and "that's

what I will do in this sentencing." 11/17/05 Tr. 55-56. Those statements -- some of which were quoted in the court of appeals' opinion, but others of which were not, see Pet. App. B3 -- strongly suggest that the district court believed that Congress (and the Sentencing Commission, following Congress's mandate) had required sentencing courts to impose sentence in a manner consistent with the 100:1 ratio. The court's statements thus support the conclusion that it believed that it lacked discretion to consider the crack-powder disparity, contrary to Kimbrough's later holding.

3. In light of the court of appeals' oversight in interpreting the district court's statements at sentencing, the appropriate course is for this Court to vacate the court of appeals' judgment and to remand for further proceedings. The court of appeals, in turn, should remand to the district court for resentencing. The district court, of course, would remain free to impose a within-Guidelines sentence if it agrees with the government that a downward variance is not warranted based on the facts of this case..

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment vacated, and the case remanded for further proceedings in light of the position expressed in this brief.

Respectfully submitted.

GREGORY G. GARRE
Acting Solicitor General

MATTHEW W. FRIEDRICH
Acting Assistant Attorney General

NINA GOODMAN
Attorney

AUGUST 2008